

**Before the
Federal Communications Commission
Washington, D.C. 20554**

In the Matter of)	
)	
Comcast Cable of Indiana/)	
Michigan/Texas, Inc.)	File No. CSB-A-0709
Order Setting Basic Service,)	
Equipment and Installation)	
Rates)	
Irving TX (TX 0783))	

ORDER

Adopted: August 23, 2004

Released: August 24, 2004

By the Deputy Chief, Policy Division, Media Bureau:

I. INTRODUCTION

1. On March 22, 2004, Comcast Cable of Indiana/Michigan/Texas, Inc. (“Comcast” or the “company”), filed an appeal of a rate order adopted by the City of Irving, Texas (the “City of Irving” or “the City”).¹ The City filed an opposition on April 2, 2004,² to which Comcast filed a reply on April 8.³ On June 22, 2004, Comcast filed a supplement to its appeal⁴ and a motion for leave to file the supplement.⁵

¹ Appeal of Local Rate Order (“Comcast Appeal”), filed March 22, 2004.

² Response of the City of Irving, Texas, to the Appeal of Local Rate Order (“City of Irving Response”), filed April 2, 2004.

³ Reply to Response to Appeal of Local Rate Order (“Comcast Reply”), filed April 8, 2004.

⁴ Supplement to Appeal of Local Rate Order (“Comcast Supplement”), filed June 22, 2004.

⁵ Motion for Leave to File Supplement to Appeal of Local Rate Order (“Comcast’s Motion”), filed June 22, 2004. Comcast’s Motion is similar to a request for extension of time. It is our policy that such requests “shall not be routinely granted.” 47 C.F.R. § 1.46(a). Nevertheless, we find that good cause exists to accept Comcast’s supplement. The supplement comments on our recent ruling in *Comcast Cablevision of Dallas, Inc.*, DA 04-1703 (released June 14, 2004), available at 2004 WL 1322925, which was released after the close of the pleading cycle in this appeal and is pertinent to the issue discussed in ¶¶ 10-13 *infra*. Also, the City of Irving has not opposed Comcast’s Motion. Accordingly, we grant Comcast’s Motion.

The City, raising its own procedural issue, complains that Comcast and our rules made it burdensome for the City to file a timely response to Comcast’s Appeal. City of Irving Response at 4. Cable operators and franchising authorities should cooperate in notifying each other of filings in rate appeals and, when one party’s filing takes unusually long to reach the other, in acceding to brief and necessary extensions of time (see Comcast Reply at 4). As in this case, the Commission will grant such extensions for good cause shown.

2. Comcast's appeal concerns three aspects of a rate order adopted by the City on February 5, 2004.⁶ The aspects are: the Rate Order's lack of a written explanation for its conclusions, its disapproval of Comcast's proposed rate of \$5.95 for digital additional outlets, and what Comcast claims is the Rate Order's disapproval of the company's proposed depreciation rate for converters and remotes. We conclude, in brief, that the Rate Order's lack of a written explanation for its findings requires that it be remanded to the City of Irving for further proceedings. We also grant Comcast's appeal and remand the Rate Order with respect to the City's effort to regulate Comcast's charges for digital additional outlets. Finally, we remand the Rate Order to permit the City to clarify its action on Comcast's depreciation rate.

II. BACKGROUND

3. The Communications Act of 1934, as amended, ("the Act"),⁷ provides that, where effective competition is absent, rates for the Basic Service Tier ("BST") and associated equipment are subject to regulation by franchising authorities.⁸ Rates for the BST and equipment should not exceed rates that would be charged by systems facing effective competition, as determined in accordance with Commission regulations for setting rates.⁹ If the cable operator fails to meet its burden of proof, has improperly calculated its rates, or is unresponsive to requests for relevant information, the franchising authority may use the "best information available" to review the operator's proposed rates and, if appropriate, adjust them and order refunds.¹⁰

4. Rate orders issued by franchising authorities may be appealed to the Commission pursuant to Commission rules.¹¹ In ruling on appeals of local rate orders, the Commission will not conduct a *de novo* review, but instead will sustain the franchising authority's decision as long as a rational basis for that decision exists.¹² The Commission will reverse a franchising authority's rate decision only if it determines that the franchising authority acted unreasonably in applying the Commission's rules. If the Commission reverses a franchising authority's decision, it will not substitute its own decision but instead will remand the issue to the franchising authority with instructions to resolve the case consistent with the Commission's decision on appeal.

⁶ Ordinance No. 8288 of the City of Irving TX ("Rate Order"), dated February 5, 2004, which is Attachment A to Comcast Appeal.

⁷ 47 U.S.C. § 151 *et seq.*

⁸ 47 U.S.C. § 543(a)(2).

⁹ 47 U.S.C. § 543(b)(1); 47 C.F.R. § 76.922.

¹⁰ 47 C.F.R. § 76.937(d); *Falcon Classic Cable*, 15 FCC Rcd 5717, 5720 (2000) ¶ 10; *Western Reserve Cablevision, Inc.*, 14 FCC Rcd 13391, 13398 (1999) ¶ 12.

¹¹ 47 U.S.C. § 543(b)(5)(B); 47 C.F.R. § 76.944.

¹² *Harron Commun. Corp.*, 15 FCC Rcd 7901 (2000) ¶ 2; *Implementation of Sections of the Cable Television Consumer Protection & Competition Act*, 8 FCC Rcd 5631 (1993), 9 FCC Rcd 4316, 4346 (1994) ¶ 81.

III. DISCUSSION

A. Preliminary Issues

5. Written Explanation for the City's Decision. Comcast challenges the City's Rate Order on the grounds that it merely states that the company's proposed \$5.95 rate for digital additional outlets is "unreasonable and should be set aside," without stating any rationale or explanation for that decision.¹³ Section 76.936 of our rules requires that a franchising authority issue a written decision in a rate case.¹⁴ Our case law has also required that the written decision affirmatively support any ruling that a cable operator's proposed rate is unreasonable.¹⁵ This protects the cable operator's right to due process and gives it a basis to re-file its rate or appeal the decision to the Commission. We have repeatedly remanded franchising authorities' decisions that summarily or vaguely reject a cable operator's proposed rates.¹⁶ Where a franchising authority relies on a report prepared by a consultant whom it has retained, we have required the franchising authority's decision to do more than simply refer to the consultant's report.¹⁷

6. We find that the City of Irving's Rate Order contained less than the minimum written rationale or explanation that our rules and case law require. The Rate Order's ruling about Comcast's proposed rate for its digital additional outlets is a bare conclusion that the proposed rate is unreasonable. Elsewhere, the Rate Order does refer to a consultant's recommendations,¹⁸ but it neither attaches any report by the consultant nor incorporates it by reference. Indeed, in this appeal the City specifically denies general reliance on its consultant's recommendations.¹⁹

7. To satisfy the standard of our case law that a rate order must affirmatively support any ruling that a cable operator's proposed rate is unreasonable and/or that a prescribed rate is reasonable, the order should meet one of two criteria. The first is that each ruling in the order to which a participant has objected must, within the order's four corners, contain a written explanation sufficient to support a finding by the Commission on appeal that a rational basis for the ruling exists.²⁰ The second is that an external

¹³ Comcast Appeal at 2, n.4, citing *id.*, Attachment A, *supra* note 6, at 2 § 5.

¹⁴ 47 C.F.R. § 76.936(a).

¹⁵ See, e.g., *Sammons Communications, Inc.*, Order DA-04-2070 at ¶ 14, released July 12, 2004, available at 2004 WL 1542188; *Comcast Cablevision of Dallas, Inc.*, *supra* note 5, at ¶ 12; *TCI of Pennsylvania, Inc.*, 18 FCC Rcd 7058, 7062-63 (2003) ¶ 20 & cases cited therein; *Marcus Cable Partners, L.L.C.*, 15 FCC Rcd 8794, 8798 (2000) ¶ 11 & cases cited therein.

¹⁶ See authorities cited *supra* note 15.

¹⁷ See, e.g., *Time Warner Cable*, 13 FCC Rcd 13795, 13796-97 (1998) ¶ 4 ("Although the Town references the consultant's report, the Town's Order neither explains why Time Warner's proposed rate . . . is unreasonable nor why the prescribed rate of . . . is reasonable.").

¹⁸ See, e.g., Rate Order, *supra* note 6, at 1 (fifth and sixth "WHEREAS" clauses).

¹⁹ See, City of Irving Response at 3 ("The City did review the consultant's report, but did not adopt the report. . . . [S]ections of the report were not followed in the City's Rate Ordinance."); Rate Order, *supra* note 6, at 3 § 10 ("in adopting this ordinance, the City is not approving or acquiescing in any way whatsoever to cost data and/or methodologies not specifically addressed herein.").

²⁰ *Keyspan-Ravenswood, LLC v. FERC*, 348 F.3d 1053, 1058-59 (D.C. Cir. 2003) (internal quotations omitted) ("in the orders on review, the Commission did not respond to the petitioners' argument and evidence [P]ost hoc salvage operations of counsel cannot overcome the inadequacy of the Commission's explanation."); *AT&T Corp. v. FCC*, 236 F.3d 729, 734-35 (D.C. Cir. 2001) ("The reviewing court should not attempt itself to make up for (continued...)

document, such as a consultant's report, that the order relies on and contains such an explanation be incorporated by reference in and attached to the rate order.²¹ It would be helpful, but may not be necessary, for the rate order to refer to the passages in any attachments that support its decisions.

8. By these criteria, the City of Irving's Rate Order, in its unexplained dismissal of Comcast's proposed rate for digital additional outlets, is deficient. We grant Comcast's the appeals from that portion of the Rate Order and we remand it for elaboration under the two criteria stated in the preceding paragraph.

9. Compliance with the City's Rate Order. It appears possible that after the City issued its Rate Order, finding Comcast's proposed rates for digital additional outlets unreasonable and setting them aside, Comcast continued charging the proposed rates.²² Comcast believes that the Cities have no authority over rates for such equipment.²³ Nevertheless, when a franchising authority adopts a rate order and it takes effect, the decisions made therein are binding absent certain clearly recognized exceptions. Those are a stay of the rate order, a Commission decision granting an appeal from the rate order,²⁴ or an agreement by the franchising authority and the cable operator to make other arrangements, such as continuing increased rates in effect pending an appeal. Otherwise, however, rate orders of franchising authorities are effective and binding upon cable operators upon their release.²⁵

(...continued from previous page)

[deficiencies in a commission's written decision]; we may not supply a reasoned basis for the agency's action that the agency itself has not given." Both the cases just cited relied on *SEC v. Chenery Corp.*, 332 U.S. 194, 196-97 (1947), which stated that "[i]t will not do for a court to be compelled to guess at the theory underlying the agency's action . . ."

²¹ *Sammons Communications, Inc.*, *supra* note 15, at ¶ 16; *Dallas*, *supra* note 5, at ¶ 12; *Falcon Cablevision*, 16 FCC Rcd 4633, 4639 n.43 (2001) ¶ 16.

²² Comcast Appeal at 2 n.2 ("Comcast implemented this charge on December 1, 2003. All other . . . charges are in compliance with the City's Order.").

²³ *Id.* at 2-5.

²⁴ 47 C.F.R. § 76.933(g)(2) (speaking of "subject to a prospective rate reduction and refund if the franchising authority subsequently issues a written decision disapproving any portion of such rates").

²⁵ *See, e.g.*, 47 C.F.R. § 76.10(c)(2) ("unless a stay is granted by the Commission, the decision by the administrative law judge will become effective upon release and will remain in effect pending appeal."); *Dallas*, *supra* note 5, at ¶ 14; *TCI of Pennsylvania, Inc.*, Memorandum Opinion & Order DA 04-1496 at ¶ 9, released May 26, 2004, available at 2004 WL 1161509 ("Neither TCI's appeal of the order nor its request for a stay renders the order unenforceable."); *Mickelson Media, Inc., d/b/a/ Adelphia Cable Commun.*, 15 FCC Rcd 13311, 1313-14 (2000) ¶ 7 ("absent a stay, cable operators are expected to comply with valid rate orders when issued").

B. Substantive Issues

10. Rate for “Digital Additional Outlet.” Comcast challenges the City’s rejection of its proposed \$5.95 monthly rate for its “digital additional outlets.” Comcast claims that the rate for such outlets is beyond the City’s authority,²⁶ but the City counters that its authority over the BST and associated equipment encompasses them.²⁷

11. Comcast assesses a digital additional outlet charge only against subscribers to its digital cable service. An unspecified number of Comcast subscribers have additional outlets in their premises. Through these outlets subscribers receive BST and other programming transmitted in analog and digital format. But it is only Comcast subscribers who subscribe to Comcast’s digital tier (and who want additional outlets) who pay the digital additional outlet charge.²⁸ It is this specific charge that is at issue in this appeal. Customers who subscribe only to Comcast’s BST or to Comcast’s BST and Cable Programming Service Tier (“CPST”), or to Comcast’s BST and premium services, do not pay the digital additional outlet charge.

12. In our recent Order in *Comcast Cablevision of Dallas* (“Dallas”),²⁹ we reviewed our case law governing franchising authorities’ jurisdiction over rates for additional outlets. We noted two lines of cable rate decisions, both dating from years before the widespread availability of digital cable service. One line of cases held that the rate for an additional outlet through which the BST passes was subject to regulation by the franchising authority, regardless of what other programming also passed through the outlet.³⁰ The other line of cases concerned the CPST, which we used to regulate.³¹ That line of cases held that we, and not franchising authorities, had authority over rates charged for additional outlets which were assessed only against subscribers of CPST programming.³² In our recent *Dallas* decision, we interpreted these cases to confer authority over the rate for digital additional outlets on franchising authorities unless the rate reflected the cost of digital programming.³³ We wish to clarify that decision on our own motion and, accordingly, we make the following clarification of franchising authorities’ jurisdiction over digital additional outlet charges.

13. The Act and our rules give franchising authorities authority over the BST and equipment used to serve BST customers.³⁴ Thus, if a cable operator charges a rate for additional outlets used by

²⁶ Comcast Appeal at 2-5; Comcast Reply at 3-4; Comcast Supplement *passim*.

²⁷ City of Irving Response at 2.

²⁸ Comcast Appeal at 3 n.6. (“The digital tier consists of . . . services, none of which are local broadcast or PEG channels.”).

²⁹ *Dallas*, *supra* note 5, ¶¶ 15-17.

³⁰ See, e.g., *Falcon Cablevision*, 13 FCC Rcd 16847, 16849 (1998) ¶ 6; *Falcon Cablevision*, 12 FCC Rcd 23500, 23502 (1997) ¶ 7.

³¹ 47 U.S.C. § 543(a)(2)(B), (c)(4).

³² See, e.g., *Warner Cable Commun., Inc.*, 10 FCC Rcd 9966, 9969-70 (1995) ¶ 19 (“Charges associated solely with the CPS tier are under the Commission’s jurisdiction.”); *Community Cablevision Co.*, 10 FCC Rcd 5115, 5516-17 (1995) ¶ 9.

³³ *Dallas*, *supra* note 5, ¶ 17.

³⁴ 47 U.S.C. § 543(a)(2)(A). Concerning rates for outlets in particular, see 47 C.F.R. § 76.923(a, h).

customers who subscribe to the BST, then the operator's certified franchising authority has jurisdiction over the rate for those outlets. The digital tier of cable service, however, is best analogized to the CPST and to premium programming, over which franchising authorities do not have rate-setting authority. An additional outlet charge assessed only against CPST subscribers, though they also subscribe to the BST, is not subject to franchising authority jurisdiction.³⁵ During the period when CPST rates were subject to oversight by the Commission, such a charge had to be based on the cost of the CPST programming. Of course, now that the CPST is unregulated, a CPST additional outlet charge is itself unregulated. An additional outlet charge imposed on subscribers to other unregulated programming, such as premium programming, though subscribers receiving premium programming also subscribe to the BST, is not subject to franchising authority jurisdiction.³⁶ Similarly, an additional outlet charge assessed only against digital tier subscribers, though they also subscribe to the BST, is not subject to franchising authority jurisdiction. Thus, in this case, where Comcast charges a rate specifically for additional outlets used by subscribers to the digital tier, that rate is beyond the regulatory authority of the City of Irving. The rate need not be based on the operator's digital programming costs, as suggested in our *Dallas* decision, but it could be. Accordingly, we grant Comcast's appeal of the City of Irving's Rate Order with respect to Comcast's additional outlet charge imposed on digital tier subscribers. We conclude that this result best conforms to the statutory scheme for rate regulation, our precedent, and the policy of relating our authority over equipment pricing to authority over the related programming.

14. Depreciation Charges. Comcast claims that the City's Rate Order, without authority or rational basis, rejects the company's three-year depreciation schedule for converters and remotes, and substitutes a five-year schedule.³⁷ Comcast does not, however, relate this claimed error to any particular rate set in the Rate Order.³⁸ The City replies that nothing in its Rate Order specifically adopts any depreciation schedule or sets any rate based on one.³⁹ Moreover, the City states, although its consultant suggested the five-year depreciation schedule to which Comcast objects, the Rate Order neither adopts nor rejects that suggestion, nor sets any rates based on it.⁴⁰ Rather, the City explains, its Rate Order was based on the totality of Comcast's proposals, the consultant's report, Comcast's response, and a public hearing. Therefore, the City argues, Comcast is appealing from something other than the Rate Order, from something (the consultant's recommendation) that is not part of the Rate Order and therefore has no legal significance.⁴¹ Comcast counters that the consultant's recommendation must be inherent in the City's Rate Order because the Rate Order, just before prescribing exactly the rates suggested by the

³⁵ See authorities cited *supra* note 32.

³⁶ *Comcast Cablevision of Mt. Clemens, Inc.*, 10 FCC Rcd 11046, 11048 (1995) ¶ 13 ("The Commission's rules state that, because per-channel and per-program offerings are not regulated under the 1992 Cable Act, a cable operator is free to offer such programming at rates that vary depending on the number of outlets that are hooked up to receive those services. Thus, the City has no jurisdiction to prohibit such a practice.") (footnote omitted).

³⁷ Comcast Appeal at 5-7. See also *id.*, Attachment B (Letter from C2 Consulting Services, Inc., to Mr. Keith Rinehart, Communications Manager, City of Bedford TX, *et al.*, dated May 2, 2003) at 7, 10 (estimating a five-year depreciation period as "as a possible alternative computation").

³⁸ See Comcast Appeal at 2 n.2 ("The only rate immediately at issue [in this appeal] is Comcast's additional outlet charge," whose City-ordered rate of zero was presumably uninfluenced by depreciation matters).

³⁹ City of Irving Response at 2-3.

⁴⁰ *Id.* at 3.

⁴¹ *Id.*

consultant, “finds that, based upon all submitted data, . . . the . . . rates shown below *as recommended by* [the consultant should] be accepted as reasonable.”⁴²

15. The City is correct that its Rate Order is silent about depreciation and does not explicitly attribute any significance to the consultant’s suggestion that troubles Comcast. The City may not, however, rely on that silence to elude scrutiny of the Rate Order. As noted in paragraphs 3-4 above, local franchising authorities’ decisions about rates for the BST and associated equipment are subject to review before this Commission under a standard of rationality and reasonableness. Comcast is entitled to know whether the Rate Order, including especially any rate prescribed therein, was based on the City disapproving Comcast’s deprecation proposal. Accordingly, we remand the City of Irving’s Rate Order for a determination whether any rate set therein is based on a rejection of Comcast’s proposed depreciation schedule for converters and remotes.

IV. ORDERING CLAUSES

16. Accordingly, **IT IS ORDERED** that the Appeal filed by Comcast Cable of Indiana/Michigan/Texas, Inc., in CSB-A-0709, **IS GRANTED IN PART AND REMANDED** for further consideration consistent with this Order.

17. This action is taken pursuant to authority delegated by Section 0.283 of the Commission's rules. 47 C.F.R. § 0.283.

FEDERAL COMMUNICATIONS COMMISSION

John B. Norton
Deputy Chief, Policy Division, Media Bureau

⁴² Comcast Reply at 1-2, quoting Rate Order, *supra* note 6, at 2 § 4 (italics and bracketed words added).